Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of:	)	
	)	
Petition of MCI for Declaratory Ruling	)	CCBPol 97-4
	)	CCDocket No. 96-98

COMMENTS OF AD HOC COALITION OF TELECOMMUNICATIONS MANUFACTURING COMPANIES

These comments, by an ad hoc coalition of telecommunications manufacturing companies, respond to MCI's petition in CCBPol 97-4.[1/] In that petition, MCI asks the FCC to issue a declaratory ruling concerning a specific provision which appears in Southwestern Bell's Oklahoma and Kansas Statement of Generally Available Terms ("SGAT") for provision of network elements and in a Texas arbitration decision. The subject provision makes clear that a competing local exchange carrier ("CLEC"), not the incumbent local exchange carrier ("ILEC"), has the duty to negotiate agreements to use any intellectual property belonging to a party other than the ILEC which is embedded in an unbundled network element to be used by that CLEC. MCI first asks the FCC to hold that very few network elements contain intellectual property belonging to parties other than the ILEC.[2/] For a situation where intellectual property embedded in a network element is owned by a party other than the

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1/ Companies participating in the ad hoc coalition are Ambox; Axes Technologies; California Amplifier; DGM&S; Eagle Telephonics; Expeditor Systems; Helix Limited; H & L Instruments; LC Technologies; Metal-Flex Hosing; OK Champion; RayTel; Remarque Mfg.; Tamaqua Cable Products; Teltrend; and XTP Forum.

2/ MCI Pet. at 6-7.

ILEC, MCI asks the Commission to hold that the Communications Act requires the ILEC to negotiate the CLEC's use agreement.[3/]

DISCUSSION

For reasons discussed below, the Commission should not issue the ruling which MCI seeks. Instead, it may properly hold that the provision at issue in the SGAT and in the arbitration decision is reasonable.

I. There Is No Basis to Hold that Very Few Network Elements Contain Intellectual Property Belonging to a Party Other than the ILEC Which Provides Those Elements

There are two reasons why the Commission should not hold that very few network elements contain intellectual property belonging to a party other than the ILECs which provide those elements. First, Section 1.2 of the FCC's Rules does not justify that holding. Section 1.2 contemplates that the Commission will issue a declaratory ruling only if doing so would "terminat[e] a controversy" or "remov[e] uncertainty". An FCC determination about how often third parties own intellectual property in network elements would not terminate controversy or remove uncertainty. This is because the disputed issue is whether the government should force an ILEC to negotiate agreements permitting CLECs to use third party property embedded within a network element regardless of how frequently third parties own such property.

Second, even if determining the frequency of third party property interests in network elements would terminate controversy or remove uncertainty (which it will not do), the Commission still

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[3/] Id. at 7-9.

should not declare that such third party interests occur infrequently since MCI provides no facts to support that contention. In fact, manufacturers often retain property rights in the products they sell to LECs. These rights include copyrights with respect to software, patent rights covering a specific product or the method by which the product works, technical information that constitutes trade secrets under State or Federal law, and contract rights restricting the manner in which the ILEC may use a particular product.

II. Nor Does MCI Provide a Basis for Requiring that the ILEC Negotiate a CLEC Use Agreement With Third Parties Who Do Own Intellectual Property Contained in Network Elements Provided by that ILEC

MCI also does not justify imposing a requirement that ILECs negotiate agreements allowing CLECs to use third-party-owned property in network elements regardless of how frequently such third party ownership interests occur. The first argument MCI makes to support its request for imposing this duty -- that the ILEC's obligation to provide network elements on "nondiscriminatory" terms requires the ILEC to undertake this negotiation -- is plainly specious.[4/] While the ILEC's duty of misdiscrimination requires the ILEC to provide nondiscriminatory access to the ILEC's property, it would be irrational to hold that it also requires the ILEC to provide access to property which the ILEC does not own.

MCI's second argument for imposing this requirement -- that it is in the public interest to do so because ILECs have greater lev-

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[4/] Id. at 8.

erage than CLECs to negotiate favorable use agreements for CLECs -- is equally false.[5/] In the first place, MCI offers no evidence to support the premise that ILECs have greater bargaining power than CLECs to negotiate CLEC use agreements. In fact, CLECs -- especially giant CLECs like MCI-- may have greater bargaining power than ILECs to negotiate favorable use agreements for themselves. But even ignoring the absence of evidence supporting the premise that ILECs have greater bargaining power, MCI's argument still fails since the company also provides no evidence to support its counterintutive assumption that an ILEC would actually use its bargaining power to negotiate a more favorable use agreement for CLECs -- ILEC competitors -- than CLECs could negotiate for themselves.

MCI's final argument for mandating ILEC negotiation of CLEC use agreements -- that doing so will ensure that the ILEC absorbs the cost of any royalty required by a third party property owner in exchange for permitting CLEC use of that party's property -- is misplaced as well.[6/] The FCC has held that an ILEC may charge a CLEC any costs which the ILEC incurs in order to make a network element available.[7/] A royalty required by a third party property owner in exchange for permitting CLEC use of the third party's

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[5/] Id.

[6/] Id. at 9.

[7/] See, e.g., Implem. of Local Compet. Provisions in the Telecom. Act of 1996, First Report and Order at ¶¶200-01 (FCC 96-325, rel. Aug. 8, 1996), app. pending, Iowa Util. Board v. FCC, No. 96-3321 (8th Cir.).

property would be a chargeable cost under that Commission holding.[8/]

III. It Would Be Appropriate for the Commission to Make Clear that the Provisions at Issue In the SGAT and In the Arbitration Decision Are Reasonable

While the FCC should not issue the ruling that MCI seeks for reasons discussed above, it would be appropriate for the Commission to rule on the validity of the provision in the SGAT and arbitration decision which prompted MCI's petition; and if it does so it should uphold that provision as reasonable. The subject provision makes essentially a single point: a CLEC using a network element has responsibility to ensure that it obtains authorization to use any intellectual property owned by a third party which is embedded in that element. Far from being unreasonable, it is imminently reasonable for ILECs to place CLECs on notice that third parties may own intellectual property embedded in network elements. In the absence of providing that notice, a CLEC could be subject to a sub-

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[8/] While third parties owning intellectual property contained in a network element should have an incentive to negotiate agreements with CLECs authorizing CLEC use of the third party's property on fair terms, the FCC lacks jurisdiction either to require that third parties enter such agreements or to regulate the size of the use royalty. A government agency has authority to require that a property owner license others to use the owner's property only if Congress has made the compulsory licensing authority explicit. See Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (citing Lyng v. Payne, 476 U.S. 926 (1986); Gibas v. Saginaw Min. Co., 748 F.2d 1112, 1117 (6th Cir. 1984), cert denied, 471 U.S. 1116 (1985). Congress has not provided the FCC with explicit authority to require a third party to negotiate agreements authorizing CLECs to use any intellectual property embedded in a network element which belongs to the third party.

stantial claim for damages by unwittingly using the property of a third party without authorization.

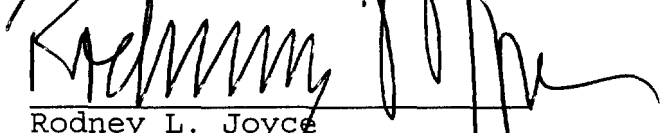
As worded in the arbitration decision, the subject provision is reasonable for another reason too. Not only does it inform CLECs about how to avoid potential liability for unauthorized use of intellectual property contained in network elements, it also requires the ILEC to (a) provide CLECs with "a list of all known and necessary licensing and right-to-use agreements applicable to the subject network element(s)" and (b) "use its best efforts to facilitate the obtaining of any necessary license or right-to-use agreement." Such cooperation by ILECs in order to facilitate CLEC negotiation of use agreement with third party property owners obviously is reasonable.

CONCLUSION

The FCC should not issue the ruling which MCI seeks since the company has provided no reasons which justify that ruling. However, it would be appropriate for the Commission to make clear that the provision in the Oklahoma/Kansas SGAT and in the Texas arbitration decision which prompted MCI's petition is reasonable.

Respectfully submitted,

AD HOC COALITION OF TELECOMMUNICATIONS MANUFACTURING COMPANIES

by: 

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